No. 230.

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BRIEF FOR PLAINTIFFS IN ERROR.

Brf. of Quarles & Lines for P.E.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1900.

No. 230.

Filed Mar. 14, 1901.

EDWARD W. SPEED, AS ADMINISTRATOR OF WILLIAM B. FRANKLIN, DECEASED, ET AL.,
Plaintiffs in Error,

vs.

PATRICK B. McCARTY,
Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF PENNINGTON COUNTY, STATE OF SOUTH DAKOTA.

(17,689.)

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Counsel for Plaintiffs in Error.

THE EDW. KEOGH PRESS, BROADWAY, MILWAUKEE.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 230.

EDWARD W. SPEED, AS ADMINISTRATOR OF THE ESTATE OF WILLIAM B. FRANKLIN, DECEASED; CORA C. STONE, AS HEIR-AT-LAW OF SAID WILLIAM B. FRANKLIN, DECEASED; GEORGIA B. BIERMAN, AS SOLE DEVISEE AND HEIR-AT-LAW OF JENNIE E. FRANKLIN, DECEASED; ALVAH F. FAY, AS EXECUTOR OF THE LAST WILL OF SAID JENNIE E. FRANKLIN, DECEASED; THOMAS C. BLAIR, ALBERT AMSBURY, JOHN S. GEORGE, GEORGE E. YOST AND PHILLIP M. RANNEY, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF JOHN J. FAYEL, DECEASED; ALMA LAMBERT FAYEL AND THERESA HELEN FAYEL, BY ALMA LAMBERT FAYEL, HER GUARDIAN, AS HEIRS-AT-LAW AND SUCCESSORS IN INTEREST OF JOHN J. FAYEL, DECEASED.

Plaintiffs in Error.

vs.

PATRICK B. McCARTHY.

Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

This is a writ of error to a judgment of the circuit court of Pennington County, State of South Dakota, rendered and entered by that court on the 13th day of January, A. D. 1900, in obedience to the opinion and mandate of the supreme court of the State of South Dakota, commanding said judgment to be entered.

STATEMENT OF THE CASE.

The action was commenced on the 12th day of April, 1895, in the circuit court of Pennington County, South Dakota, by the defendant in error against Thomas C. Blair, Albert Amsbury, William B. Franklin and John J. Fayel. Franklin and Fayel, and also Jennie E. Franklin, one of the heirs at law of William B. Franklin, having died *pendente lite*, the action was duly revived against their several personal representatives and heirs at law, who, together with Blair and Amsbury, are the plaintiffs in error.

The object of the action was to establish the right of the defendant in error to a one-eighth interest in certain mining claims situated in Pennington County, and known as the Holy Terror and Key Stone No. 4 Mining Claims, both lode claims, which were respectively duly located in the months of June and September, 1894, by William Franklin, under and pursuant to the laws of the United States governing the location and sale of mineral lands.

The pleadings, by proper averments, present the issues raised by the contentions of the respective parties.

A trial was had in the circuit court of Pennington County, before the judge of that court, without a jury, and in accordance with the practice prevailing in South Dakota, the trial judge made and filed findings of fact and conclusions of law upon which a judgment was entered, dismissing the complaint of defendant in error (plaintiff in the court below), upon the merits, and in favor of the plaintiffs in error (defendants in the court below), for costs. (Rec., pp. 27-28.)

A bill of exceptions was settled and a motion for a new trial was made by defendant in error, which motion was overruled by the court. (Rec., pp. 29-31.)

From the judgment of the circuit court the defendant in error appealed to the supreme court of the State of South Dakota, which court, on December 21, 1898, rendered its opinion and judgment reversing the judgment of the circuit court of Pennington county and remanding the case for a new trial. (Rec., pp. 34-39.) This opinion and judgment of the supreme court were based in part, upon a consideration of the evidence contained in the bill of exceptions.

Thereafter, on motion of plaintiffs in error, a rehearing was granted by the supreme court of South Dakota, and upon the reargument of the case it was brought to the attention of that court that the order overruling the motion for a new trial had not been entered at the time the appeal was taken. The cause being reargued, the supreme court of South Dakota held, that because the order overruling the motion for a new trial was not entered at the time the appeal was taken, that order and the evidence contained in the bill of exceptions, was not before the supreme court for consideration, and that the case must be determined upon the findings of fact made and filed by the trial judge. Upon consideration of the case on such findings of

fact, and on September 2nd, 1899, the supreme court of South Dakota rendered its further opinion and judgment, reversing the judgment of the circuit court of Pennington County and remanding the case "with directions to enter judgment, and adjudging the plaintiff to be the owner of a one-eighth interest in and to so much of the ground covered by the Holy Terror claim and the Key Stone No. 4 claim, as is embraced within the boundaries of the Tin Bar No. 1 and Tin Bar No. 2, as shown by the circuit court's findings of fact, and for his costs and disbursements in the court below." (Rec., pp. 40-41.)

Judgment was entered by the circuit court of Pennington County on the 13th day of January, 1900, in obedience to the last mentioned opinion, judgment and mandate of the supreme court of South Dakota, adjudging the plaintiff to be the owner of a one-eighth interest in certain lands specifically described in the judgment, being that portion of the Holy Terror and Key Stone No. 4 claims embraced within the boundaries of the Tin Bar No. 1 and Tin Bar No. 2 claims. (Rec., pp. 44-46.)

From the foregoing it will be seen that both the judgment of the supreme court and the judgment of the circuit court of Pennington County, sought to be reviewed, are based upon the findings of fact made by the circuit court of Pennington County, and that the evidence in the case was not before the supreme court of South Dakota and is not before this court.

The facts in the case, as appear from the findings of fact of the trial court, which are dated February 15th, 1896, are as follows:

1st. That on the 16th day of September, 1882, a portion of the ground in controversy was located as the Reed Placer Mining Claim by Jacob F. Reed and William Franklin, who were competent to make such location, and complied with all the laws of the United States and the State of South Dakota governing the location of mining claims, and who remained in the actual, notorious and peaceable possession, and were the acknowledged and reputed owners thereof until the year 1892; and during each of the intervening years, and particularly the year 1887, caused to be done upon said placer location one hundred dollars' worth of development work. (Finding 2, Rec. p. 22.)

2nd. That on the 25th day of January, 1888, Jacob F. Reed, William Franklin, Thomas C. Blair and Frank Eaton marked the boundaries of the Tin Bar No. 1 location upon the ground with stakes, as required by law, and posted a discovery or location notice thereon, and within sixty days thereafter recorded the location certificate for said Tin Bar No. 1 in the office of the Register of Deeds in and for said Pennington County, but did no other act or acts of location at the time. (Finding 5, Rec. p 23.)

3rd. That the location or discovery notice of said Tin Bar No 1 lode claim was posted at a point inside the boundary lines of the Reed placer claim, and between 150 and 200 feet easterly

of the northwesterly boundary line of said Reed placer claim; said point being also claimed as the discovery point on said Tin Bar No. 1 claim. (Finding 6, Rec. p. 23.)

4th. That the only reference to any natural object or permanent monument in the description of the Tin Bar No. 1 location, contained in the location certificate therefor, is as follows: "Said discovery shaft being situated upon said lode within the lines of said claim in Cross Mining District, County of Pennington, Territory of Dakota, and lays 400 feet to the east of the United States location No. 29 monument, and crosses Battle Creek on the southeast end, is fully staked and marked in accordance with the United States mining laws." (Finding 7, Rec. p. 23.)

5th. That during the year 1888, Frank Eaton conveyed to one Williams an undivided one-fourth interest in the Tin Bar No. 1 claim, and during the same year said Williams executed and delivered to the plaintiff and one Michael McGuire a mining deed, in due form, to said undivided one-fourth interest. (Finding 21, Rec. p. 25.)

6th. That no labor was performed or improvements made upon said Tin Bar No. 1 location, except about four days' work in 1889, and about four days' work in 1891; such work being of the value of not exceeding $14.00 in each of said years. (Finding 8, Rec. p. 23.)

7th. That there was no agreement on the part of Thomas C. Blair and William Franklin, or either of them, with the plaintiff, to perform any labor or to make any improvement on said Tin Bar No. 1 location in the year 1893 or 1894, and no contractual relations existed between said parties in regard to said Tin Bar No. 1 location at the time of the location of the Holy Terror claim on the 28th day of June, 1894. (Finding 9, Rec. p. 23.)

8th. That on the 25th day of January, 1888, Thomas C. Blair and Frank Eaton marked the boundaries of the Tin Bar No. 2 location upon the ground, with eight substantial posts or stakes, and posted a location notice upon the said claim, and within sixty days thereafter recorded a location certificate for the same in the office of the Register of Deeds in and for said Pennington County, but that they did no other act or acts of location at the time. (Finding 10, Rec. pp. 23-24.)

9th. That during the year 1888, Frank Eaton conveyed by deed, in due form, to one Williams, an undivided one-fourth interest in Tin Bar No. 2 claim, and during the same year said Williams executed to the plaintiff and one Michael McGuire, a mining deed, in due form, of said one-fourth interest. (Finding 21, Rec. p. 25.)

10th. That on April 22nd, 1890, Frank Eaton conveyed to William B. Franklin, an undivided one-fourth interest in and to said Tin Bar No. 2 claim, and Thomas C. Blair conveyed an undivided one-fourth interest therein to Jacob F. Reed. (Finding 21, Rec. p. 25.)

11th. That no labor was performed or improvements made upon the said Tin Bar No. 2 location, except about four days' labor performed thereon in 1891, of the value of not to exceed the sum of fourteen dollars. (Finding 11, Rec. p. 24.)

12th. That there was no agreement on the part of William Franklin and Thomas C. Blair, or either of them, with the plaintiff, to perform any labor or to make any improvements upon said Tin Bar No. 2 location, for and during the years 1892, 1893 or 1894, and that there were no contractual relations between said parties with reference to said location during said years. (Finding 12, Rec. p. 24.)

13th. That on November 23rd, 1892, an application was made for a patent to the Reed placer claim by the owners thereof, and that final entry of the same was made in the United States Land Office at Rapid City, South Dakota, on the 13th day of March, 1893; that there was no application for a lode aside from the placer patent. (Finding 3, Rec. p. 23.)

14th. That no adverse was filed by the plaintiff or other owners of the Tin Bar No. 1 and Tin Bar No. 2 locations to the said application for patent to the Reed Placer claim. (Finding 15, Rec. p. 24.)

15th. That at and prior to the time of the application for patent for said Reed Placer claim, to-wit: the 23rd day of November, 1892, there were no lodes or veins upon said Reed Placer claim, within the boundary lines of said Tin Bar No. 1 and Tin Bar No. 2 locations, of such a character as to render the ground more valuable because of their presence, or to justify the expenditure of money for either exploitation or development. (Finding 16, Rec. p. 24.)

16th. That in said application for patent for said Reed Placer claim, there was no application for patent for any lodes or veins included therein. (Finding 17, Rec. p. 24.)

17th. That Blair and Franklin, during the year 1891, discovered a well-defined ledge of mineral-bearing rock in place carrying gold, upon the said Tin Bar No. 2 claim, which said point of discovery was outside the limits of the said Reed Placer mining claim. (Finding 23, Rec. pp. 25-26.)

18th. That William Franklin, on the 28th day of June, 1894, filed a location certificate for the Holy Terror claim, and on the 20th day of September, 1894, an amended location certificate for the Key Stone No. 4 claim, and that said locations were both properly made and valid locations of the ground described in said certificates respectively, and that all the laws of the United States and of the State of South Dakota relating or applicable to said locations had been complied with down to the time of trial. (Finding 13, Rec. p. 24.)

19th. That the southeast end of the said Holy Terror lode claim embraces a portion of the ground covered by the northwest end of the Tin Bar No. 1,—the area in conflict amounting to 1 62-100 acres. (Finding 18, Rec. pp. 24-25.)

20th. That the southeast end of the Key Stone No. 4 location embraces a portion of the ground covered by the Tin Bar No. 2 location,— the area in conflict amounting to 2 71-100 acres. (Finding 19, Rec. p. 25.)

21st. That the location notice upon the said Tin Bar No. 1 claim was posted upon a well-defined ledge of rock in place carrying tin, but that the parties to this action had no knowledge of the existence of tin or other valuable deposits therein until after this action was commenced, to-wit: until during the trial of this action. (Finding 24, Rec. p. 26.)

22nd. That the defendants in the court below, who, or their successors in interest, are the plaintiffs in error, are the owners of the Holy Terror and Key Stone No. 4 locations, save for the rights of the plaintiff in the court below, defendant in error here, if any he has. (Finding 14, Rec. p. 24.)

23rd. That the plat introduced in evidence by the defendants, marked Exhibit 2, correctly shows the position occupied on the earth's surface by the said Reed Placer, Tin Bar No. 1, Tin Bar No. 2, Holy Terror and Key Stone No. 4 locations, and correctly shows the boundary lines of said several locations, together with the location stakes, notices, discovery shafts and workings on said claims, and correctly shows the area and extent of conflict of said locations with each other. (Finding 20, Rec. p. 25.)

A copy is here inserted of so much of this plat, Ex. 2, as shows the boundaries of the Reed Placer, the two Tin Bars, the Holy Terror and the Keystone No. 4 claims, and the extent of their interference. The boundaries of the Reed Placer are indicated by unbroken lines, those of the Tin Bars by dotted lines, and those of the Holy Terror and Keystone No. 4 by broken lines.

N
TIN BAR NO1
HOLY TERROR
TIN BAR NO2
KEYSTONE NO4
REED PLACER

Upon these facts defendant in error contended that he was entitled to an interest in so much of the land included within the Holy Terror and Key Stone No. 4 claims as lay within the boundaries of the Tin Bar No. 1 and Tin Bar No. 2 claims, upon the ground that the Tin Bar claims were valid and subsisting mineral claims at the time of the location of the Holy Terror and Key Stone No. 4,—the title thereto being then held jointly by the following named persons, in the proportions stated, viz: By the defendant in error, one-eighth; by William Franklin, Thomas C. Blair and Jacob F. Reed, one-fourth each, and by one McGuire, one-eighth. The theory of the defendant in error being that he and the persons above named were tenants in common of the Tin Bar claims at the time of the location of the Holy Terror and Key Stone No. 4 claims by Franklin, and that therefore the location of the latter claims, so far as they embraced the land covered by the Tin Bar claims, inured to the benefit of all the owners of the Tin Bar claims, in proportion to their respective interests.

Plaintiffs in error contended that no tenancy in common existed in respect of the Tin Bar claims, and that defendant in error had no interest in the Holy Terror and Key Stone No. 4 claims, upon the following, among other, grounds:

First. That both Tin Bar claims had become abandoned and forfeited and the land covered thereby subject to relocation at and before the location of the Holy Terror and Key Stone No. 4, by and because of the failure of the owners of the Tin Bar claims to perform the representation work required by Section 2324 of the Revised Statutes, and

Second. That it being expressly found that at the time of the application for patent for the Reed Placer claim there were no lodes or veins upon said claim, within the boundary lines of either of the Tin Bar claims, the Tin Bar No. 1 claim in its entirety, and the Tin Bar No. 2, so far as it lay within the limits of the Reed Placer, were extinguished and lost by the patenting of the Reed Placer claim.

In its opinions the supreme court of South Dakota adopted the contention of the defendant in error, and by its mandate directed the circuit court of Pennington County to enter judgment accordingly. To review which judgment this writ of error has been sued out.

ASSIGNMENTS OF ERROR.

The assignments of error contained in the record, so far as the same will be insisted upon in this court, are directed to the following points:

1st. That the court below erred in holding and deciding that the two Tin Bar claims were valid and existing claims at the time of the location of the Holy Terror and Key Stone No. 4 claims, and had not become forfeited and abandoned by

reason of the failure to perform thereon the work required by Section 2324 of the Revised Statutes, and that defendant in error and William Franklin were, at said time, co-owners of said Tin Bar claims.

2nd. That the court below erred in holding and deciding that the Tin Bar No. 1 claim, in its entirety, was not extinguished and lost to the owners thereof by the patenting of said Reed Placer claim.

3rd. That the court below erred in holding and deciding that so much of the Tin Bar No. 2 claim as was embraced within the boundaries of the Reed Placer claim was not extinguished and lost to the owners thereof by the patenting of the Reed Placer claim.

4th. That the court below erred in holding and deciding upon the facts found, that the location of the Holy Terror and Key Stone No. 4 by William Franklin, inured to the benefit of the defendant in error.

ARGUMENT.

I.

This court has jurisdiction, because it appears that the State Courts could not have reached the conclusion they did without deciding against a title, right and privilege set up and claimed by the plaintiffs in error, under the Statutes of the United States regulating the disposition of mineral lands.

Whenever the adjudication of a federal question is necessarily involved in the disposition of a case by a state court, this court has jurisdiction, under section 709 United States Revised Statutes, to review the decision of the state court, although it does not affirmatively appear in the record or in the opinion of the state court that such a question was raised and decided.

Kaukauna Co. vs. Green Bay, etc., Canal Co., 142 U. S., 254, and cases cited, page 269.
Roby vs. Colehour, 146 U. S., 153.

And this is true although the state court has put its decision upon other grounds.

Anderson vs. Carkins, 135 U. S., 483.

In this case, however, it does affirmatively appear from the opinions of the supreme court of South Dakota, read in connection with the pleadings and findings of fact, that the plaintiffs in

error claimed the entire and exclusive title to the premises in controversy under the provisions of chapter 6 of Title XXXII of the Revised Statutes of the United States, and that the state courts decided against the claim made by the plaintiffs in error. It also further appears that the plaintiffs in error based their denial of any right or title in the defendant in error to said premises, upon the provisions of said chapter 6, and particularly of section 2324 of the Revised Statutes, and that the contention and claim of right thus made and set up by the plaintiffs in error, was denied by the state courts.

In compliance with the second clause of rule 8, the opinions of the supreme court of South Dakota have been transmitted to this court and are in the printed record. These opinions, under the law of South Dakota, form a part of the record in the circuit court of Pennington County, to which the writ of error in this case is directed.

Section 6242 of the Annotated Code of South Dakota (Section 5217 Compiled Laws) reads: "Upon an appeal being perfected, the clerk of the court from which the appeal is taken shall, at the expense of the appellant, forthwith transmit to the supreme court if the appeal is from a judgment, the judgment roll; if the appeal is from an order, he shall transmit the order appealed from, and the original papers used by each party on the application for the order appealed from. The court may, however, in each case, direct copies to be sent in lieu of the originals. The clerk shall also, in all cases, transmit to the supreme court the notice of appeal and undertaking given thereon; and he shall annex to the papers so transmitted a certificate under his hand and the seal of the court from which the appeal is taken certifying that they are the original papers or copies, as the case may be, and that they are transmitted to the supreme court pursuant to such appeal. No further certificate or attestation shall be necessary."

And Section 6463 (Section 5238 Compiled Laws) provides: "In all cases the supreme court shall remit its judgment or decision to the court from which the appeal or writ of error was taken, to be enforced accordingly; and if from a judgment, final judgment shall thereupon be entered in the court below in accordance therewith, except when otherwise ordered. The clerk of the supreme court shall remit to such court the papers transmitted to the supreme court on the appeal or writ of error, together with the judgment or decision of the supreme court thereon, within sixty days after the same shall have been made, unless the supreme court, on application of either of the parties, shall direct them to be retained for the purpose of enabling such parties to move for a rehearing. In case such motion for a rehearing is denied, the papers shall be remitted within twenty days after such denial. The clerk of the supreme court shall in all cases, except when the order or judgment is affirmed,

also transmit with the papers so returned by him, a certified copy of the opinions of the supreme court."

These opinions, therefore, may and should be looked into to determine whether a federal question is involved.

Murdock vs. Memphis, 20 Wall., 633
Dale Tile Mfg. Co. vs. Hyatt, 125 U. S., 46-53.
Philadelphia Fire Ass'n vs. New York, 119 U. S., 110.
O'Neil vs. Vermont, 114 U. S., 343-349.
Dibble vs. Bellingham Bay Land Co., 163 U. S., 69.

In considering the two opinions rendered by the supreme court of South Dakota in this case, to determine whether a federal question is involved, it must be borne in mind that the case was heard and determined in that court upon findings of fact, which, for the purposes of the case, were and are to be considered verities.

It will be helpful to restate in a condensed form the facts upon which arise the questions of law presented for decision.

From the findings it appears that in September, 1882, Jacob F. Reed and William Franklin duly located the Reed placer claim, which included a portion of the ground in controversy; that they remained in the actual, notorious and peaceable possession thereof and complied with all the laws of the United States and of the State of South Dakota relative to such claims, down to and including the time when final entry thereof was made, in March, 1893. (Findings 2 and 3, Rec. pp. 22-23.)

That on January 25, 1888, Jacob F. Reed, William Franklin, Thomas C. Blair and Frank Eaton marked the boundaries of the Tin Bar No. 1 claim upon the ground with stakes, as required by law, and posted a discovery or location notice thereon, and within sixty days thereafter recorded the location certificate for said Tin Bar No. 1, but did no other act or acts of location. (Finding 5, Rec. p. 23.) That the location notice upon said Tin Bar No. 1 claim was posted upon a well defined ledge of rock in place carrying tin, but that the parties to this action had no knowledge of the existence of tin or other valuable deposits therein until during the trial of this action. (Finding 24, Rec. p. 26.) That the location or discovery notice of said Tin Bar No. 1 was posted at a point inside the boundaries of the Reed Placer claim, said point being also claimed as the discovery point on said Tin Bar No. 1 claim. (Finding 6, Rec. p. 23.)

That on the same day, Thomas C. Blair and Frank Eaton marked the boundaries of the Tin Bar No. 2 location upon the ground, and posted a location notice upon the said claim, and within sixty days recorded a location certificate, but did no other act or acts of location. (Finding 10, Rec. p. 23.)

That in the year 1888 the defendant in error acquired a one-eighth interest in the Tin Bar No. 1 and Tin Bar No. 2 claims through *mesne* conveyances from and under said Frank Eaton.

(Finding 21, Rec. p. 25.) That no work was performed upon the Tin Bar No. 1 claim, except about four days' work in 1889, and the same amount in 1891, being of the value of not exceeding $14 in each of said years. (Finding 8, Rec. p. 23.) That no work was performed upon the Tin Bar No. 2 location except about four days' work in 1891, of the value of not exceeding $14.00. (Finding 11, Rec. p. 24.)

That on November 23, 1892, application was made for a patent to the Reed Placer claim by the owners thereof, and that final entry was made on March 13, 1893. That at and prior to the time of the application for patent upon said Reed Placer claim, there were no known lodes or veins upon said Reed Placer claim within the boundary lines of said Tin Bar No. 1 and Tin Bar No. 2 locations, of such a character as to render the ground more valuable because of their presence, or to justify the expenditure of money for their exploitation or development. That in said application there was no application for patent for any lodes or veins. That no adverse was filed by the owners of either the Tin Bar No. 1 or the Tin Bar No. 2 locations to the said application for patent of the Reed Placer claim. (Findings 3, 15, 16, 17, Rec. pp. 23-24.)

That in June, 1894, William Franklin filed a location certificate for the Holy Terror claim, which includes 1.62 acres of the land embraced in the Tin Bar No. 1 claim, and in September, 1894, filed an amended location certificate for the Key Stone No. 4 claim, which includes 2.71 acres of the lands embraced in the Tin Bar No. 2 claim; and that all the laws of the United States and of the State of South Dakota relating or applicable to said locations, had been complied with, down to the time of trial. (Findings 13, 18 and 19, Rec. pp. 24-5.)

It is also expressly found as a fact, that there were no contractual relations between William Franklin and Thomas C. Blair, or either of them, and the defendant in error, in reference to the performance of development work upon the Tin Bar claims. (Findings 9 and 12, Rec. pp. 23-24.)

These findings of fact which, as before stated, are to be treated as verities in this case, present the following questions:

First. Whether Tin Bar No. 1 claim, in its entirety, was extinguished and lost to the owners thereof by the patenting of the Reed Placer claim.

Second. Whether the Tin Bar No. 2 claim, to the extent that it conflicted with the Reed Placer, was extinguished and lost to the owners thereof by the patenting of the Placer claim.

Third. Whether, notwithstanding the failure of the owners of the Tin Bar claims to perform thereon the work required by Section 2324, R. S., those claims continued to be valid and subsisting claims, and the locators thereof or their grantees co-tenants in respect thereto; so that one of such locators or grantees could not make a new location, for his own benefit solely, and include therein a portion of the ground covered by said Tin Bar claims although, by reason of such failure to

work, said claims had become "open to relocation in the same manner as if no location of the same had ever been made."

These questions can only be determined by the application to the established facts of a correct interpretation of the provisions of chapter 6 of Title XXXII of the Revised Statutes, particularly of sections 2324, 2333 and 2336. One construction of the provisions of this chapter will sustain the claim of the plaintiffs in error, while another construction will defeat it and sustain the claim of the defendant in error, and all dispute between the parties, both in the court below and here, was and is over the true interpretation of this statute.

There is no suggestion that the rights of the parties are in any way dependent upon the statutes of the State of South Dakota, or any local mining regulations, and it is expressly found that there were no contractual relations between the parties in interest. Nor can it be claimed that the supreme court of South Dakota decided the case upon general principles of law; but, on the contrary, the opinions of that court clearly show that its decision was founded solely upon the interpretation which it gave to the statutes of the United States governing the disposition of mineral lands.

This being so, and the state courts having decided against the title claimed by the plaintiffs in error, under the laws of the United States, this court clearly has jurisdiction, under Section 709 of the Revised Statutes, to review that decision.

Johnson vs. Towsley, 13 Wall., 72.
Pickering vs. Lomax, 145 U. S., 310.
Northern Pacific R. R. vs. Colburn, 164 U. S., 383.
Anderson vs. Carkins, 135 U. S., 483.

The case at bar is clearly distinguishable from *Blackburn vs. Portland Gold Mining Co.*, 175 U. S., 571, and other similar cases where the question involved was dependent upon the existence or non-existence of controverted facts or upon matters *dehors* the federal statutes, presenting issues to be determined by general or local rules of law and which the state courts were competent to finally decide. Here the sole question at issue is the construction of federal statutes. The state court decided against the construction contended for by plaintiffs in error, and its ruling in that behalf was essential as a foundation for its judgment. The case, therefore, meets the requirements of the rule often announced by this court and concisely stated in *De Lamar's Nevada Gold Mining Co. vs. Nesbitt*, 177 U. S., 523, 527, that "To raise a federal question the right must be one claimed under a particular statute of the United States, the *validity, construction or applicability* of which was made the subject of dispute in the state court; and the decision upon such statute must have been adverse to the plaintiff in error."

II.

All rights acquired under the Tin Bar locations had become forfeited and abandoned at and before the time of the location of the Holy Terror and Keystone No. 4 claims.

Section 2324 of the Revised Statutes contains, among others, the following provisions: "On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars worth of labor shall be performed or improvements made during each year." "And upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns or legal representatives, have not resumed work upon the claim after failure and before such location."

The Tin Bar claims were both located January 25, 1888. No work was performed upon the Tin Bar No. 1, except about four days work in the year 1889, and a like amount in 1891; such work being of the value of not exceeding $14 in each of said years. No work was performed upon the Tin Bar No. 2 location, except about four days in 1891, of the value of not to exceed $14. (Findings 5, 8, 10 and 11, Rec. pp. 23-24.)

It thus appears that the requirements of Section 2324 R. S., relating to the performance of work upon mining claims, were never complied with by the locators of either of the Tin Bar claims in any year; and that both claims became subject to relocation on January 1, 1889. Even if the performance of work upon the Tin Bar No. 1 in 1889, and again in 1891, and the performance of work upon the Tin Bar No. 2, in 1891, was such a resumption of work upon the claims as to save them from forfeiture and relocation, until the expiration of the year 1891, there can be no question that both claims became "open to relocation in the same manner as if no location of the same had ever been made" on the 1st day of January, 1892.

Franklin located the Holy Terror claim on June 28, 1894, and the Keystone No. 4 claim on September 20, 1894, which claims respectively included small portions of the land embraced in the Tin Bar No. 1 and Tin Bar No. 2 claims. It is not questioned and can not be doubted that the land embraced in the Tin Bar claims was subject to relocation at the dates above named. The claim of the defendant in error is that because Franklin had been associated with him in the ownership of the Tin Bar claims, a relocation by Franklin of any portion of the land covered by the Tin Bar claims inured to the benefit of all the Tin Bar owners. This claim was upheld by the supreme court of South Dakota, which court, in construing

the provisions of Section 2324, held, that notwithstanding the failure of the owners of the Tin Bar claims to perform the work required by that section, those claims continued to be valid and existing mining claims; that the relation of co-tenancy continued to exist between Franklin and the defendant in error, and that by reason of this relation, Franklin could do no act with reference to the property, whether in affirmance or disaffirmance of the validity and continued existence of the Tin Bar claims that would destroy the rights of his co-tenant, except by resorting to the process called "advertising out," prescribed by said Section 2324. The correctness of this ruling is the principal question involved in this case. We are not aware that this precise question has yet been passed upon by this court. Certainly it is not decided in any of the cases cited and relied upon in the opinion in the court below.

Section 2324 declares that where there has been a failure to perform the work required "the claim or mine upon which such failure occurred *shall be open to relocation in the same manner as if no location of the same had ever been made.*" This language is most comprehensive. But one contingency is mentioned precluding the liability to such relocation, viz: "That the original locators, their heirs, assigns or legal representatives, have * * resumed work upon the claim after failure and before such location." There is no other restriction, express or implied, and no limitation as to the persons who may relocate a claim upon which there has been a failure to perform the required labor. Were it not for the proviso above quoted, there could be no ground for contending that one of several owners of a claim upon which default had been made could not relocate the claim for his sole benefit; and it is only by giving to that proviso a construction which, notwithstanding default in the performance of work, keeps the claim alive and in existence as property, and preserves the relations of the owners thereof as between themselves to the same extent as though no default had been made, that the decision of the lower court that Franklin's location of part of the ground covered by the Tin Bar claims inured to the benefit of the defendant in error can be upheld.

It may be conceded that where fiduciary relations exist, imposing upon one person the duty of performing the prescribed labor for the benefit of another, or for their joint benefit, the person upon whom the duty rests can not relocate a claim which has been rendered subject to relocation through his own default in the performance of his duty; also, that one co-tenant can not himself perform the statutory work and take title to the mine to the exclusion of his co-tenants. Such was the case of *Turner vs. Sawyer*, 150 U. S., 578, cited and relied upon by the court below.

It may also be conceded that if one of two or more co-owners of a mining claim performs the statutory work, he does so for the benefit of all, and his remedy to obtain reimburse-

ment or to foreclose the interests of his co-owners is limited to that prescribed by Section 2324; also, that if work is resumed by one of several co-owners of a claim upon which default in the performance of work has been made, or any other act is done in recognition of the former location, or by which an advantage is sought to be obtained by reason of it, that all co-owners will be entitled to any benefits thereby secured.

But in this case nothing of the kind appears. The Tin Bar claims had been subject to relocation for more than five years; there was no resumption of work under those locations, but entirely new ones were made, covering only a small part of the old; it is expressly found that there was no obligation resting upon Franklin to keep alive the Tin Bar locations by performing the statutory work; and there can be no charge that he was guilty of any breach of duty or lack of good faith. Under these circumstances, we submit that he had as much right as any other person, upon making location of new and independent mining claims, to include within them a portion of the land covered by the Tin Bar claims. Such right can not be denied without reading into the statute an exception not there found or suggested. The language of the statute is that the claim or mine "shall be open to relocation in the same manner as if no location of the same had ever been made." This language implies a forfeiture of the rights acquired by the original locators, and the proviso which gives to the original locators the privilege of resuming work, and thus reviving the rights forfeited by default, can not be so construed as to create or preserve in them a continuing estate in the ground covered by the claim, to which the rules of law applicable to the owners of estates in lands can properly be applied. Resumption of work avoids the effect of the forfeiture and restores the rights of the locators, but the right to resume work is not an interest or estate in the land, in the ownership of which cotenancy can exist. It is merely a personal privilege extended to the locator, by which he may reinvest himself with the possessory title lost by his failure to perform representation work.

This construction of section 2324 would seem to be the only one possible, in view of the fact that that section does not provide for the acquisition of title to the land, but only for securing and retaining possession, and the steps taken under that section are not necessarily taken with a view to obtain title in fee. *Benson Mining Co. vs. Alta Mining Co.*, 145 U. S., 428-431. The requirements and limitations prescribed by section 2324 have reference merely to the initiation and preservation of the possessory right given by section 2322, which right, by that section, exists only "so long as they (the locators) comply with the laws of the United States and with the state, territorial and local regulations, not in conflict with he laws of the United States governing their possessory title."

"The interest in a mining claim, prior to the payment of any money for the granting of a patent for the land, is nothing more than a right to the exclusive possession of the land based upon a condition subsequent, a failure to fulfill which forfeits the locator's interest in the claim."

Black vs. Elkhorn Mining Co., 163 U. S., 445-450.

In a case before the Commissioner of the General Land Office in 1881, the precise question here at issue was decided in favor of the contention of the plaintiffs in error. In that case the question was thus stated: "Can one of the locators of a mining claim, upon which the necessary amount of expenditures for a given year have not been made, relocate the same as abandoned property, in his own name and for himself only?"

After quoting the provision of section 2324, the Acting Commissioner said:

"From this it will be seen that the only question to be considered in the case stated is whether one of a number of original locators, whose claim has been abandoned, would stand upon the same footing as a stranger to the first location, who, by the provisions above recited, is expressly authorized to relocate said abandoned claim.

It is clear that one of a number of locators of a certain claim can, concurrently with such joint location, locate a separate claim independently of his co-locators; and as an abandoned claim reverts to the mass of unappropriated public lands, and becomes subject to a new appropriation, *"in the same manner as if no location of the same had ever been made"*, I can see no valid objection to a new adverse location of such claim by one of the former locators."

Copp's U. S. Mineral Lands, 300.
8 Copp's Land Owner, 3.

While the question has not, so far as we know, been passed upon by the federal courts, the doctrine here contended for has been in substance upheld in several decisions in the state courts. Thus it has been held, that notwithstanding an agreement between co-tenants that one should perform the necessary work, failure to perform it rendered the land subject to relocation, and that the one upon whom the duty to perform the work rested could make a valid relocation, the only remedy of the other being an action for damages or a suit in equity to declare a trust.

Saunders vs. Mackey, 5 Mont., 523.

And where there was a failure to work and notice a claim held by several jointly, which failure, under the local mining regulations, rendered the claim open to relocation as vacant

ground, it was held that one of the tenants in common could unite with strangers in a relocation of the land, and that the other co-tenants would have no interest therein.

Strang vs. Ryan, 40 Cal., 34.

So where there had been an agreement, pursuant to which mining locations had been made but not perfected, and such agreement was dissolved, it was held that there was no obligation resting upon the parties to such agreement to perfect the locations commenced in pursuance of it, and that subsequent locations of the same ground made by some of them, were not held in trust for the others.

Page vs. Summers, 70 Cal., 121.

The only semblance of title which the locators of the Tin Bar claims or their grantees ever had to the land covered thereby was the possessory right secured to them by Section 2322 R. S., in virtue of their locations. While this possessory right existed it no doubt constituted a species of estate in the land which might be held by several persons jointly as tenents in common.

But by the terms of the statute (Secs. 2322 and 2324) the failure to perform the required work forfeited the possessory right and restored the land to the public domain. The estate itself, such as it was, being destroyed, the tenancy in common must necessarily have also ended. And with the termination of the relation the obligations arising therefrom or incident thereto likewise ceased leaving the former co-owners as free to deal with the land as strangers.

Coleman vs. Coleman, 3 Dana (Ky.), 398.
Smiley vs. Dixon, 1 Pen. & Watts, 439.
Reinboth vs. Zerbe Run Imp. Co., 29 Pa. St., 139.
Kirkpatrick vs. Mathiot, 4 Watts & S., 251.
Mace vs. Mace, 24 App. Div. (N. Y.), 291.
Wright vs. Sperry, 21 Wis., 331.
Alexander vs. Sully, 50 Iowa, 192.
Wells vs. Chapman, 4 Sandf. Ch., 312.
Sands vs. Davis, 40 Mich., 14.
Freeman on Cot. and Part., Sec. 159.

Inasmuch as any one of several locators may at any time, by merely resuming work, revive the rights forfeited by failure to perform statutory work in time, it imposes no hardship to hold that a failure to perform the work required by statute, or to resume work after there has been a forfeiture, not only renders the land "open to relocation, in the same manner as if no location of the same had ever been made," but also releases the co-owners from all obligations arising from such co-owner-

ship, the same as the recision of an express agreement was held to do in *Page vs. Summers, supra.*

On the other hand, to hold that because A. B. and C. had at one time been co-tenants of a mining claim, though they had for years failed to comply with the statutes and the claim had been open to relocation, none of them could relocate such claim or take any steps to acquire title thereto, except for the benefit of all, is to inject into the statute limitations and restrictions not expressed nor fairly to be implied, and to introduce new complications into the law respecting a subject as to which it is already greatly complicated.

Where, as in this case, there is no suggestion of unfair dealing or breach of faith, it is certain that the relocator did not intend to perpetuate the old location or to obtain any advantage by reason of it, and there had been a total failure for more than five years to perform the work required by law, there would seem to be no shadow of reason for holding that the parties who voluntarily defaulted upon the old location, can come in and claim the benefit of the enterprise and industry of their former associate, which has resulted in the discovery and development of valuable property.

III.

All rights under the Tin Bar No. 1 location and all under the Tin Bar No. 2 location, so far as it conflicted with the Reed Placer claim, were lost by the patenting of the Reed Placer.

It is found as a fact in the case, that at and prior to the time of the application for patent for the Reed Placer claim, to-wit: November 23rd, 1892, there were no lodes or veins upon said Reed Placer claim, within the boundary lines of the Tin Bar No. 1 and Tin Bar No. 2 claims, of such a character as to render the ground more valuable because of their presence, or to justify the expenditure of money for either exploitation or development. (16th finding, Rec. p. 24.) This finding, read in connection with the sixth finding, that the location or discovery notice of the Tin Bar No. 1 was posted inside the boundary line of the Reed Placer, and the 24th finding, that said location notice was posted upon a well-defined ledge of rock in place carrying tin, but that the plaintiff and defendants had no knowledge of the existence of tin or other valuable deposits therein until after this action was commenced, must be construed as meaning either that at the time of the application for patent of the Reed Placer there were no *known* lodes or veins upon that portion of the Reed Placer claim included within the boundaries of the Tin Bar claims, or that such lodes

or veins, if known, were not "of such a character as to render the ground more valuable because of their presence, or to justify the expenditure of money for either exploitation or development." In either case the findings are consistent and they establish the fact that at the time of the application for the placer patent there was no vein or lode known to exist within the boundaries of the placer claim, such as is exempted from the operation of a placer patent by Section 2333, R. S. It follows that by virtue of said Section 2333, the title to all lodes or veins within the boundaries of the placer claim passed by the placer patent.

Sullivan vs. Iron Silver Mining Co., 143 U. S., 431.
Migeon vs. Montana Central R'y Co., 44 U. S. Appls., 724.
Dower vs. Richards, 151 U. S., 658.
Deffeback vs. Hawke, 115 U. S., 392.

The fact that the Tin Bar claims had been located in part upon the ground covered by the placer claim, as found by the court below, does not, under the circumstances of this case, and in face of the express finding of the court to the contrary, establish that there were known lodes or veins within the limits of the placer claim, and bring the case within the doctrine of *Noyes vs. Mantle, 127 U. S., 348*. In that case the Pay Streak lode was discovered and duly located April 23, 1878, and was a valid, subsisting claim, entitling the owners to the exclusive possession at the time of the application for the placer patent, on December 14th, 1878. In the case at bar, the Tin Bar claims were located January 25, 1888. The statutory amount of labor was never done upon them, and no labor at all was performed later than the year 1891, so that they had lapsed and became forfeited long prior to the application for the placer patent, which was made on November 23, 1892. Thus there is a broad distinction upon the facts between *Noyes vs. Mantle* and the instant case.

It may be conceded, though it is not so found, that a sufficient discovery of mineral was made to support the location of the Tin Bar claims, and that these locations were valid at their inception, so that the locators thereof, became entitled to the exclusive possession of the ground covered thereby, so long as they complied with the requirements of the statute. But this does not show that at the time of the application for the placer patent there were veins or lodes known to exist upon the placer ground, within the meaning of that section, 2333. There is a substantial difference between the discovery of a vein or lode, sufficient to support a location within the meaning of Section 2320 on the one hand, and a lode "known to exist" within the limits of a placer claim, at the time application is made for a patent therefor under Section 2333, on the other.

One object of Section 2320 was to prescribe certain conditions upon which mining claims may be located upon the public land and a possessory right thereto secured, and it being the policy of the government, as declared in Section 2319, that all valuable mineral deposits in lands belonging to the United States shall be open to exploitation and purchase, the provisions of Section 2320 have justly received a liberal interpretation. It has always been held that to constitute a discovery of a vein or lode within the meaning of that section, it was sufficient if the locator found rock or earth in place containing mineral in sufficient quantity to justify him in expending his time and money in prospecting and developing the claim, whether the rock or earth be rich or poor; whether it assay high or low.

Migeon vs. Montana Central Ry. Co., 44 U. S. App., 724.

Book vs. Justice, 58 Fed. Rep., 106, and cases therein cited.

But in construing the provisions of section 2333 it is evident that other questions are to be taken into consideration. This section of the statute was primarily intended for the benefit and protection of locators of placer claims. If a lode is known to exist within the boundaries of a placer claim, the applicant for a patent must state that fact, and then, by paying five dollars ($5.00) an acre for that portion of the ground, and two and 50-100 dollars ($2.50) an acre for the balance, a patent will issue to him covering both the lode and placer ground. But if the lode is known to exist and is not included within the application for a patent, then it will be construed as a conclusive declaration that the owner of the placer claim has no right of possession by virtue of his patent for the placer ground to the vein or lode. It matters not whether there is a lode or vein actually within the limits, the existence of which subsequent developments may disclose. If it is not known to exist at the time of the application, the patent for the placer claim will carry title to the lode or vein. In such cases this court has repeatedly declared that it is not enough that there may have been some indications by out-cropping on the surface of the existence of lodes or veins of rock in place bearing precious metals, even though sufficient to induce further investigation, to justify their designation as "known lodes or veins"; that in order to meet that designation, the lodes or veins must be clearly ascertained and known to be of such extent as to render the land more valuable on that account and to warrant their exploitation and development as mines.

Iron Silver Mining Co. vs. Reynolds, 124 U. S., 374-383.

U. S. vs. Iron Silver Mining Co., 128 U. S., 673-683.

Iron Silver Mining Co. vs. Mike & Starr Gold & Silver Mining Co., 143 U. S., 394-404.

Nor is it sufficient to except lodes or veins from the operation of a placer patent, that their existence was suspected or that it was commonly believed or believed by the patentee that there were such veins within the limits of the placer claim.

Sullivan vs. Iron Silver Mining Co., 143 U. S., 431.
Iron Silver Mining Co. vs. Reynolds ,124 U. S., 374.

Neither will the fact that a lode existed and had been worked for years with profit, prevent such lode from passing under a placer patent, where work had ceased prior to the application for the patent, and it was not then known that the lode was still valuable for mining purposes.

Dower vs. Richards, 151 U. S., 658.

And in another case in which the facts affecting this question were very similar to those in the case at bar, it was held that the fact that a lode claim had been located upon land covered by a placer claim, was not sufficient to show the existence of a known lode at the time of the application for the placer patent, when it also appeared that work upon the lode had been abandoned and the land had become subject to relocation before that time. In other words, that the prior location of a lode claim which has not been kept alive by performance of the annual assessment work, will not prevent such lode from passing under a placer patent, where there is no other evidence to show that a lode was "known to exist" at the time application is made for the placer patent.

Migeon vs. Montana Central R'y. Co., 44 U. S. App., 724.

In the case at bar the facts as found are:

(1) That on January 25th, 1888, the boundaries of the Tin Bar claims were marked upon the ground, discovery notices posted and within sixty days thereafter location certificates recorded, *but no other act or acts of location were done*.

(2) That the statutory amount of work was never done upon the claims, and

(3) That at the time of the application for patent to the Reed Placer claim, November 23rd, 1892, there were no lodes or veins known to exist, of such a character as to render the ground more valuable because of their presence, or to justify the expenditure of money for either exploitation or development.

Upon these facts we submit this case is governed by *Dower vs. Richards, supra, Migeon vs. Montana Central R'y. Co., supra*, and other like cases above quoted, and not by *Noyes vs. Mantle, 127 U. S., 348*.

From this it follows that the title to so much of both of the Tin Bar claims as was included within the boundaries of the Reed Placer claim passed under the placer patent, and that inasmuch as the alleged discovery point upon the Tin Bar No. 1 claim was within the limits of the Reed Placer claim, the title to the whole of that claim failed.

Gwillim vs. Donnellan, 115 U. S., 145.
Miller vs. Girard, 33 Pacific Rep., 69.

Therefore defendant in error as a former owner of the Tin Bar No. 1 is entitled to no interest in the Holy Terror; and as a former owner of the Tin Bar No. 2 is entitled to no interest in so much of the Keystone No. 4 as may lie within the boundaries of the Reed Placer.

Upon the foregoing grounds we respectfully urge that the judgment of the circuit court of Pennington County, South Dakota, should be reversed.

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